

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEB 28 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Qwest Communications) WC Docket No. 03-11
International Inc.)
)
Consolidated Application for Authority)
to Provide In-Region, InterLATA Services in)
New Mexico, Oregon and South Dakota))

To The Commission

REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.
IN SUPPORT OF CONSOLIDATED APPLICATION
FOR AUTHORITY TO PROVIDE IN-REGION, INTERLATA SERVICES IN
NEW MEXICO, OREGON AND SOUTH DAKOTA

R Steven Davis
Dan L Poole
Andrew D Crain
John L Munn
Lynn A Stang

Qwest Communications
International Inc
1801 California Street
Suite 4700
Denver, CO 80202
103-896-2794

Peter A Rohrbach
Mace J. Rosenstein
Linda L Oliver
David L. Sieradzki

Hogan & Hartson L L P
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004
202-637-5600

Counsel for Qwest Communications
International Inc

February 37, 2003

No. of Copies rec'd 0+9
Lit. ANCOE

TABLE OF CONTENTS

	<u>Page</u>
I INTRODUCTION AND SUMMARY: GRANT OF QWEST’S APPLICATION IS SUPPORTED BY THE RECORD AND COMMISSION PRECEDENT.	1
II THE RECORD DEMONSTRATES THAT THE REQUIREMENTS OF SECTION 271(C)(1) HAVE BEEN SATISFIED IN NEW MEXICO, OREGON AND SOUTH DAKOTA	4
A Competition in Each of the Application States Fully Satisfies the Commission’s Track A Precedent	4
B Residential Competition in New Mexico Satisfies the Requirements of Track A	6
1 Qwest Faces Substantial PCS Residential Competition in New Mexico.	6
2 Qwest Faces Substantial Resale Residential Competition in New Mexico	18
C The Justice Department Properly Recognizes That Section 271(c)(1) Cannot Be Read to Deny InterLATA Authority When a Local Market is Open	21
III QWEST’S OSS COMPLIES WITH THE REQUIREMENTS OF SECTION 271	23
A Qwest’s EDI Documentation is Effective in Enabling CLECs to Build EDI Interfaces	24
B The Instances of Order Rejects Cited by WorldCom Do Not Call Into Question the Efficacy of Qwest’s EDI Documentation or the Adequacy of Its OSS	31
1 Feature Identification	31
2 Area Codes on “Forward To” Numbers	33
C The Remaining OSS Issues Raised are Minor and Do Not Affect a Finding of Section 271 Compliance	35
1 Updating USOC Tables in Oregon	35
2 Address Validation for Second Lines	37
3 Process for Updating CSRs	39

4	Commercial Performance Results	40
5	Loop Qualification Language in Oregon SGAT	40
IV	QWEST'S COMMERCIAL PERFORMANCE CONTINUES TO SATISFY THE REQUIREMENTS OF SECTION 271	41
V	QWEST'S NETWORK ELEMENTS AND OTHER CHECKLIST OFFERINGS COMPLY FULLY WITH TELRIC AND OTHER APPLICABLE RULES	45
A	Qwest's Pricing and Rate Structure for Transport Entrance Facilities Satisfy TELRIC and Other Applicable Rules, as the Commission Has Already Found.	45
B	The Pricing-Related Arguments of AT&T, Integra and the Payphone Associations Are Not Appropriate for Consideration in this Section 271 Proceeding	48
VI	NONE OF THE REMAINING OBJECTIONS RAISED BY COMMENTERS PROVIDES ANY BASIS FOR DENIAL OF QWEST'S APPLICATION	50
A	Touch America Has No Foundation for Its Allegations that Qwest Will Not Comply with Section 272.	50
B	The SDPUC Has Approved Qwest's QPAP and Recommended that Qwest's Application for interLATA Authority in South Dakota Be Granted	52
C	The FCC and NMPRC Already Have Rejected AT&T's Argument that "Unfiled Agreements" Matters in New Mexico Prevent a Public Interest Finding Here	53
D	The City of Portland's Allegations Regarding Access to UNEs Already Are Being Considered in an Appropriate Forum and Are Not Material to this Commission's Consideration of Qwest's Section 271 Application.	57
	CONCLUSION	58

Attachments	Tab
Declaration of Gary L. Noble Cricket Television Commercial	1
Reply Declaration of Lynn M.V. Notarianni and Christie L. Doherty Checklist Item 2 (OSS)	2
Reply Declaration of Michael G. Williams Performance Measures Results	3
Joint Reply Declaration of Jerrold L. Thompson and Thomas R. Freeberg Pricing and Checklist Item 13 (Reciprocal Compensation)	4

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Qwest Communications)	WC Docket No. 03-11
International Inc.)	
)	
Consolidated Application for Authority)	
to Provide In-Region, InterLATA Services in)	
New Mexico, Oregon and South Dakota))	

To: The Commission

**REPLY COMMENTS OF
QWEST COMMUNICATIONS INTERNATIONAL INC.
IN SUPPORT OF CONSOLIDATED APPLICATION
FOR AUTHORITY TO PROVIDE IN-REGION, INTERLATA SERVICES IN
NEW MEXICO, OREGON AND SOUTH DAKOTA**

Pursuant to the Commission's *Public Notice*, DA 03-125 (January 15, 2003),

Qwest Communications International Inc. ("Qwest") hereby submits its Reply Comments in the captioned proceeding

**I. INTRODUCTION AND SUMMARY: GRANT OF QWEST'S APPLICATION IS
SUPPORTED BY THE RECORD AND COMMISSION PRECEDENT**

The comments filed in this docket provide further support for grant of Qwest's application for authority to provide interexchange service in New Mexico, Oregon and South Dakota. They underscore that the time has come for residents of those states to begin to enjoy the competitive choices recently extended to consumers in nine other states in the Qwest region

Specifically, the New Mexico Public Regulation Commission ("NMPRC"), the Public Utility Commission of Oregon ("OPUC") and the **South** Dakota Public Utilities

Commission (“SDPUC”) have recommended that Qwest’s application be approved ^{1/} They point to the large record amassed in their own Section 271 proceedings demonstrating that Qwest has satisfied all elements of the competitive checklist in their respective states. They point to significant local exchange competition in their markets. And they agree that grant of interLATA authority to Qwest would serve the public interest and advance the pro-competitive objectives of the Act.

Similarly, the Department of Justice “recommends that the Commission approve Qwest’s application for long distance authority in [the application] states,” subject to the Commission’s independent evaluation. DOJ Evaluation at 2, ¶ 11-12. The Department correctly observes that local exchange markets are open in the application states. The Department notes that the OSS systems used in these states “are the same as those reviewed and approved by the Commission in the [*Qwest 271 Order*], and the performance data submitted in support of this application appear generally consistent with those submitted in support of [the Qwest III] application.” *Id.* at 2.

^{1/} See Comments of the NMPRC at 5, 64 (recommending that this Commission “approve Qwest’s application for authority to enter the in-region, interLATA market in the State of New Mexico”), Comments of the OPUC at 17 (recommending that this Commission “approve Qwest’s application to offer in-region interLATA service in the state of Oregon”), Comments of the SDPUC at 16 (concluding that Qwest has satisfied the requirements of the competitive checklist and of Track A).

As discussed below (at Section II), the NMPRC elected not to render a dispositive recommendation regarding Qwest’s compliance or non-compliance with Track A in view of perceived “significant issues of first impression.” The NMPRC instead referred the issue to this Commission. See NMPRC Comments at 30. Also as discussed below (at Section VI B.), the SDPUC initially declined to accept certain features of Qwest’s proposed South Dakota Performance Assurance Plan (the “QPAP”), see SDPUC Comments at 8-16, but subsequently accepted a revised QPAP and recommended that the FCC approve Qwest’s application.

4 few competitors nonetheless attempt to distract attention from Qwest's excellent Section 271 record by renewing arguments that have been considered, and rejected, before. These parties disregard findings by the FCC itself in the *Qwest 271 Order*, and by the State Authorities in the course of their Section 271 proceedings. But as shown below, these commenters' objections fail to overcome Qwest's showing of Section 271 compliance, or to establish any basis under the Act or Commission precedent for denial of Qwest's application.

In these Reply Comments, Qwest addresses the principal issues raised by opponents of its application. First, Qwest responds to allegations that it has not satisfied the requirements of Section 271(c)(1) generally, and in New Mexico in particular. Second, Qwest responds to certain commenters' continued criticism of its OSS and *CMP* – criticism leveled, unsuccessfully, in the *Qwest III* proceeding against the very same OSS and *CMP* – as well as issues relating to commercial performance. Finally, Qwest addresses certain additional topics raised by commenters, none of which provides any ground for denial of Qwest's application for interLATA authority.

Qwest's application demonstrates that local markets in New Mexico, Oregon and South Dakota are "irreversibly open to competition," *New York 271 Order*, 15 FCC Rcd at 4164 ¶ 429, and that Qwest has fully satisfied the requirements of Section 271. The Commission should clear the way for consumers in each of the application states to begin enjoying the benefits of more rigorous interexchange competition and the corollary benefits of a more vibrant local exchange marketplace.

Qwest's application should be granted promptly.

II. THE RECORD DEMONSTRATES THAT THE REQUIREMENTS OF SECTION 271(C)(1) HAVE BEEN SATISFIED IN NEW MEXICO, OREGON AND SOUTH DAKOTA

There can be no doubt that Qwest's local exchange markets are fully open in the three application states, just as they are in the nine states where interLATA authority was authorized in the *Qwest 271 Order*. As discussed in detail in Qwest's application, the same policies and procedures apply here, and the same OSS are in effect, as the Commission found satisfactory in its prior order. The openness of these markets is demonstrated by actual competition in each state. This competition fully satisfies the Commission's precedent regarding Section 271(c)(1).

A. Competition in Each of the Application States Fully Satisfies the Commission's Track A Precedent

The Commission has made clear that Track A is satisfied so long as a BOC can show in each state that at least one predominantly facilities-based CLEC is "an actual commercial alternative" to the BOC – which can be done by demonstrating that the CLEC serves "more than a *de minimis* number" of subscribers 2/

Qwest has demonstrated in its application that it meets this standard in each of the application states. In New Mexico, for example, as of October 31, 2002, Qwest provides 6,163 stand-alone unbundled loops to seven unaffiliated CLECs and 5,197 UNE-Ps to four CLECs

--
2/ See *Alabama, Kentucky, Mississippi, North Carolina, and South Carolina 271 order*, 17 FCC Rcd at 17755-56 ¶ 284 n.1100 (noting Section 271 applications were granted in Connecticut with 0.1% residential competition, in Vermont with 0.28%, Maine with 0.55% and New Jersey with 1.32%), *New Jersey 271 Order*, 17 FCC Rcd at 12281 ¶ 10; *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6257 ¶ 42; *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 78. In New Jersey, a CLEC serving no more than 733 residential access lines was deemed to satisfy the *de minimis* standard. See *New Jersey 271 Order*, 17 FCC Rcd at 12281-83 ¶¶ 11-13 n.33 & n.41. A CLEC serving no more than 345 residential lines satisfied the standard in Vermont. *Vermont 271 Order*, 17 FCC Rcd at 7630 ¶ 11, see also *DOJ Vermont Evaluation* at 5 n.19.

See Qwest Br at 14, Declaration of David L. Teitzel, State of Local Exchange Competition, Track A and Public Interest Requirements ("Teitzel Decl."), Att. 5, App. A, at 14-15 and Exh. DLT-Track A/PI-NM-1; see also Exh. DLT-Track A/PI-NM-3. Further, as of October 31, 2002, Qwest has completed 126 CLEC collocations and is providing 25,510 local interconnection trunks in order for CLECs to access and interconnect with Qwest's network in New Mexico. See Qwest Br at 14, Teitzel Decl. at 15. The record demonstrates comparable competition in Oregon and South Dakota. See Qwest Br at 15, Teitzel Decl. at 15-16.

Thus, Qwest fully meets Commission precedent with respect to the requirements of Track A. Sprint nevertheless attempts to argue that CLEC market share in each of the application states is inadequate to qualify under Track A. Sprint Comments at 9-10. But Sprint is simply rehashing the same arguments it previously made – and that the Commission previously rejected – in the context of the Qwest III application. ^{3/} The Commission repeatedly has rejected any suggestion that it should "require [a] particular level of market penetration;" ^{4/}

^{3/} See *Qwest 271 Order* ¶ 32. Sprint also asserts, as it did in the Qwest III proceeding, that "Qwest's methodology [for estimating CLEC market share] improperly inflates the CLECs' line estimates by including CLECs' high speed data lines and local lines which are not used for competitive local service." Sprint Comments at 10. But, as Qwest demonstrated in the Qwest III proceeding, regardless of how Sprint's, or any other CLEC's, customers use their access lines – that is, whether they connect a telephone to them and use them for voice, or connect a modem and use them for IP dial-up service – Qwest is directly competing to provide the same product: a two-way, voice-grade retail access line. The Commission has never suggested that a BOC must adjust its CLEC retail access line data to reflect the type of traffic an end user may be sending over the line at any particular moment, especially since the same access line can be used for both voice and data at different times during the same day.

^{4/} See, e.g., *New Jersey 271 Order*, 17 FCC Rcd 12281-82 ¶¶ 10, 13; *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77; *Qwest 271 Order* ¶¶ 20, 32. The Court of Appeals for the D.C. Circuit has affirmed that the Act "imposes no volume requirements for satisfaction of Track A." *Sprint v. FCC*, 274 F.3d at 553-54; see also *SBC Communications Inc. v. FCC*, 138 F.3d at 416 ("Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a 'competing' provider").

moreover, as the Commission observed in the *Qwest 271 Order*, “Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance” *Qwest 271 Order* ¶ 32

In any event, as noted above, the percentage of customers served by CLECs in each of the application states is fully consistent with the penetration rates in other states in which the Commission has granted Section 271 approval. See *Qwest Br.* at 164-65, *Teitzel Decl.* at 50-51. Sprint’s comments should be rejected.

B. Residential Competition in New Mexico Satisfies the Requirements of Track A

Two commenters – AT&T and WorldCom – have challenged Qwest’s showing regarding the extent of residential competition in New Mexico. See *AT&T Comments* at 6-22, *WorldCom Comments* at 1-7. See also *NMPRC Comments* at 19-30 (electing not to render a dispositive recommendation regarding Qwest’s compliance or non-compliance with Track A in view of perceived “significant issues of first impression” regarding the extent of residential competition). Notwithstanding the arguments raised by these commenters, and as explained below, the record demonstrates that Qwest satisfies the Track A requirements in New Mexico. See generally *Teitzel Decl.*, *we also Qwest Br.* at 12-20.

1. Qwest Faces Substantial PCS Residential Competition in New Mexico

Qwest has presented reliable and persuasive evidence that its residential wireline services face substantial competition in New Mexico from Leap Wireless International, Inc., a broadband PCS provider doing business in Albuquerque and Santa Fe as Cricket Communications. See *Teitzel Decl.* at 18-29. Indeed, while the NMPRC chose not to render any recommendation on the Track A issue, it “found it hard to believe that Cricket is serving in excess of 40,000 New Mexicans without a significant number of these customers engaging in

some form of wireline substitution.” NMPRC Comments at 29 This view is consistent with this Commission’s recent recognition, based on market data from Cricket itself, that “about 32 percent of [Cricket’s] customers use their Cricket phones as their only phone, and more than 80 percent use their Cricket phones at home ” 5/

The Commission not only has held that a Section 271 applicant “can rely on the presence of broadband PCS providers to satisfy Track A” but also has provided clear and specific guidance regarding how a BOC may demonstrate the existence of PCS broadband competition See *Second Louisiana 271 Order*, 13 FCC Rcd at 20621-33 ¶¶ 25-43. In particular, the Commission has stated that “the most persuasive evidence” of competition between PCS and wireline service is evidence of “[a]ctual customer behavior” – that is, “evidence that customers are actually subscribing to PCS in lieu of wireline service at a particular price ” *Id.* at 20624 ¶ 32 The Commission also has indicated several types of evidence that can be used to establish that competitive broadband PCS service is being used to replace wireline service, including studies or other objective analyses identifying customers who have replaced wireline service with broadband PCS service or “would be willing to consider doing so based on price comparisons ” *Id.* at 20623 ¶ 31 The Commission also has stated that “[e]vidence of marketing efforts by broadband PCS providers designed to induce such replacement are also relevant ” *Id.* The evidence presented by Qwest conforms to the Commission’s guidance and establishes that

5/ Seventh Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 17 FCC Rcd 12985, 13018-19 (2002) (footnotes omitted); see also Sixth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 16 FCC Rcd 13350, 13382-83 (2001) (“According to Leap, about half of its customers view their phones as replacements for first or second lines. ”) (footnotes omitted)

Cricket's service provides an actual commercial alternative to Qwest's local exchange service for more than a *de minimis* number of residential customers ^{6/} Teitzel Decl at 20-29

Qwest's evidence includes a survey conducted by Keith Frederick of FrederickPolls LLC (the "Cricket Survey") ^{7/} The Cricket Survey clearly establishes that at least 8,410 residential customers in New Mexico have disconnected all residential wireline service and are using Cricket's broadband PCS service as a substitute Qwest Br. at 17; Teitzel Decl at 22, *see also* Exh DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick) and Exh DLT-Track NPI-NM-6 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick), *see also* Qwest *ex parte* submission, February 13A, 2003 (tabulated responses to Cricket Survey)

The results of the Cricket Survey are not surprising given that Cricket is aggressively marketing its PCS product to induce wireline service replacement For example, a recent visit to Cricket's website reveals that the banner for Cricket's latest promotion is "Goodbye. Home Phone Hello, Hundred Bucks " ^{8/} This is consistent with the other evidence in the record of "wireless-for-wireline" marketing. **As** another example, Cricket issued a press

^{6/} Given the Commission's decision that broadband PCS service qualifies as facilities-based competition, it follows that the Commission's well-established *de minimis* standard for facilities-based competition also applies to PCS *See Second Louisiana 27f Order*, 13 FCC Rcd at 20621-33 ¶¶ 25-43

^{7/} Keith Frederick, president and owner of FrederickPolls LLC, has been involved in conducting surveys for 23 years and has managed over 2,000 telephone interview surveys, including their design and execution *See* Exh. DLT-Track A/PI-NM-5 (New Mexico PRC Corrected Direct Testimony of Keith Frederick) at 2

^{8/} *See* <http://www.cricketcommunications.com/promotion.asp> (viewed February 19, 2003). Cricket's aggressive marketing efforts have paid *off*: no commenter has disputed the survey finding that Cricket has more than 45,000 customers in New Mexico. *See* Qwest IV, Att. 5, App K, NM Vol 1, Tab 1276 at 24-25 (Rebuttal Testimony of Michael Ripperger (NMPRC Staff witness) before NMPRC Hearing Examiner conceding finding is reasonable).

release stating that it provides an “ideal solution for people who choose to go wireless instead of signing up for traditional local phone service.” Teitzel Exh DLT-Track A/PI-NM-7 (June 24, 2002. Leap Wireless Press Release), *see also* Teitzel Decl at 24-26. Additionally, Cricket has used television advertisements and direct mailers expressly and successfully to promote its PCS service as an alternative to wireline service. *See* Qwest Br at 18, Teitzel Decl at 25-26; *see also* Qwest IV, Att. 5, App K, NM Vol 1, Tab 932 at Exh JWB-1. As early as September 2001, Cricket was running television commercials in New Mexico in which a man declared that he has “no home phone” because “.Cricket’s the only phone I need.” *See Id.* at JWB-1, **Att J**. Further, as recently as February 20, 2003, Cricket was continuing to air television commercials claiming that “everywhere you look home phones are being *replaced*” by Cricket service that “works just like your home phone with all the local calls you want for one low predictable price plus plenty of free long distance,” and asking viewers “why pay for [both Cricket service and Qwest service]” when Cricket “could be your only phone?” *See* Declaration of Gary L. Noble, Cricket Television Commercial (“Noble Decl.”); Exh. GLN-Cricket-] (Transcript of Cricket Television Commercial); *see also* http://www.qwest.com/about/policy/ldReentry/files-jan15/multimedia/cricket_spot.mpg (MPEG version of Cricket Television Commercial).

Cricket’s television commercial graphically illustrates the point that Cricket’s PCS service is *replacing* wireline residential service by depicting traditional wired telephones being removed from houses at night by crickets that carry them out into the streets and throw them over a cliff. *Id.*

Notwithstanding the record evidence in the application, AT&T and WorldCom contend that Cricket’s PCS product is not an actual commercial alternative to Qwest’s wireline

residential services ^{9/} See AT&T Comments at 15-22, WorldCom Comments at 4-6 AT&T purports to find fault with the Cricket Survey, first, because it “focused only on existing Cricket customers.” According to AT&T, the results of the Cricket Survey are “unrepresentative” because they do not provide information regarding whether New Mexican “residential consumers generally view Cricket service as an actual commercial alternative to Qwest’s wireline services” AT&T Comments at 19

AT&T’s criticism is misplaced As the Commission has stated, “[t]he most persuasive evidence concerning competition between PCS and wireline local telephone service is *evidence that customers are actually subscribing to PCS in lieu of wireline service*,” rather than generic surveys of consumer attitudes regarding wireless-for-wireline substitution *Second Louisiana 271 Order*, 13 FCC Rcd 20624 ¶ 32 (emphasis added). Indeed, AT&T’s argument appears to be based on an incomplete reading of the Commission’s ***Second Louisiana 271 Order***, and specifically of the Commission’s findings regarding one of the studies at issue in that order – the “M/A/R/C Study” – which surveyed a total of only 202 self-selected PCS customers who had responded to newspaper advertisements in New Orleans In marked contrast to the Cricket Survey, the M/A/R/C Study’s conclusions regarding PCS-for-wireline substitution were derived “by extrapolating the results of the M/A/R/C study and applying them to its estimated universe of 35,000 subscribers for all five PCS carriers in the state of Louisiana” *Id.* at 20627-28 ¶ 36 The Commission criticized the M/A/R/C Study’s methodology specifically because there was no evidence that the self-selected New Orleans respondents were similar to PCS users in other parts

^{9/} As noted above and as discussed in Mr Teitzel’s declaration, Teitzel Decl. at 8, the NMPRC concluded that consumers’ reliance on Cricket’s PCS product as a substitute for Qwest’s residential wireline service presented “significant issues of first impression” and therefore opted to defer to this Commission on those issues *NMPRC Final Order* at 66 (¶ 156) See also NMPRC Comments at 30

of the state *Id.* at 20628–29 ¶ 37. This criticism clearly does not apply to the Cricket Survey, which involved a randomly selected sample of over 9,000 Cricket customers and extrapolated their usage patterns only to the larger population of *Cricket* customers, rather than to customers of other PCS carriers throughout the state. ^{10/} See Teitzel Decl at 22-23; *see also* Exh DLT-Track A/PI-NM-5 (New Mexico PRC - Corrected Direct Testimony of Keith Frederick) and Exh DLT-Track A/PI-NM-6 (Yew Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick).

AT&T and WorldCom also allege that the Cricket Survey used questions that were “hypothetical” and that the use of “hypothetical” questions “produced strange results.”

^{10/} To the extent AT&T contends that Cricket’s broadband PCS service is not a commercial alternative to Qwest because it serves only a niche market, its argument is particularly anecdotal and unpersuasive. For example, AT&T twice observes that Cricket offers “small, brightly colored wireless telephones,” which AT&T asserts are attractive to teenagers and college students who purportedly “often” do not subscribe to wireline service. AT&T Comments at 2, 16. Of course “brightly colored” phones are commonplace, and Cricket’s website reveals that it currently is promoting two very “adult” phones – the Nokia 5170 and Nokia 6370 – in New Mexico. <http://cricketletstalk.com/product/promo.htm?depId=1&pgId=100&brandId=123&cmpId=166&to=2908&setZip=87102> (viewed February 19, 2003)). AT&T has not offered a shred of evidence to support its contention that Cricket serves only a niche youth market. Contrary to this assertion, the Cricket Survey demonstrates that Cricket serves customers of all ages in New Mexico, and that 44 percent of its respondents were thirty years of age or older. See Qwest *ex parte* submission, February 13A, 2003 (tabulated responses to Cricket Survey). In any event, AT&T’s argument is legally irrelevant because nothing in the Track A requirements mandates that a qualifying CLEC compete for residential customers in every (or any particular) demographic group or type of residence. **As** the Commission has noted, Congress rejected a version of Track A that would have required the competing provider’s service to have the same “scope” as the BOC. See *Michigan 271* Order at 77 n.170. Additionally, AT&T criticizes Qwest’s “failure” to provide evidence of Qwest wireless customers who have cancelled their wireline service. See AT&T Comments at 18. However, *this criticism* likewise is irrelevant because, unlike Cricket, which has aggressively positioned its PCS product as a direct replacement for traditional wireline telephone service, Qwest does not market its wireless service as a wireline substitute. Moreover, evidence that Qwest wireless customers – or customers of any other PCS carrier – are replacing their wireline service would only serve to strengthen the New Mexico statistics regarding replacement of wireline with PCS. This underscores the conservative nature of the evidence presented in this application.

AT&T Comments at 20-22; WorldCom Comments at 5-6 11/ Specifically, AT&T and WorldCom contend that the “hypothetical” questions used in the Cricket Survey may have produced “hypothetical” answers regarding wireline replacement 12/ But the questions used in the Cricket Survey were not “hypothetical ” **As** Mr Frederick testified during the New Mexico Section 271 proceedings, “it is accepted practice to describe a pattern of behavior to survey respondents and ask whether it applies to them,” and the Cricket Survey questions were framed in accordance with this accepted practice *See* Exh. DLT-Track A/PI-NM-6 at 13 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick). 13/ Further, Mr Frederick testified

11/ Several of AT&T’s other assertions regarding the Cricket Survey are, simply, false For example, AT&T states that the Cricket Survey employed “agree/disagree” questions, which is not the case AT&T Comments at 19 (quoting the *NMPRC Order* ¶ 154) Rather, the first part of the survey described a pattern of behavior and then specifically asked respondents if that behavior was applicable to their own, and the second part of the survey asked the question “Do you have wireline local telephone service in your home?” *See* Exh. DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick) AT&T also complains that no “pre-test” of the Cricket Survey was performed. AT&T Comments at 19 (citing the *NMPRC Order* ¶ 149) But the questions included in the Cricket Survey were subject to prior review and comment by several experts at Voter/Consumer Research, the public opinion research firm responsible for conducting the Cricket Survey *See* Exh. DLT-Track A/PI-NM-6 at 15 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick)

12/ Question 2 of the Cricket Survey asked.

When some people need to start phone service, they might decide to use the Cricket phone instead of having traditional wireline phone service hooked up in their home Does this apply to you?

Similarly, Question 3 of the Cricket Survey asked.

Some Cricket customers might decide that Cricket service does away with the need to have traditional wireline phone service in their home As a result, they terminate their wireline phone services from the local phone company. Does this apply to you?

13/ *See also* Qwest *ex parte* submission, February 25A, 2003 (articulating the reasons that the questions in the first phase of the survey were framed as they were, including an attempt to limit respondent terminations by avoiding wording that could be interpreted as a sales or

that, in his 23 years of experience conducting surveys, he has found that survey respondents are “likely to understand” that this form of survey question is “attempting to elicit their actual behavior, not that of a hypothetical customer.” *Id* The questions in the first phase of the survey utilized precisely this standard industry technique by describing a condition or behavior to a phone respondent and then asking if that condition applied to him 14/

If anything, the Cricket Survey undercounts the extent to which Cricket customers are taking up the invitation in Cricket’s advertising to say “Goodbye Home Phone.” The survey was structured to be conservative in its measurement of the extent of wireless-for-wireline substitution. For example, Qwest did not count any respondent as part of the 18.5 percent of customers who terminated service in favor of Cricket unless that respondent not only (1) answered “yes” to the initial question, but *also* (2) confirmed that she did not have wireline service when she subsequently was asked the following Commission-recommended question “Do you have wireline local telephone service in your home?” 15/ Accordingly, *every single one* of the 18.5 percent of Cricket customers surveyed (translating to the approximately 8,410 to

telemarketing call and to avoid any concerns about leading respondents to an affirmative answer)

14/ See Qwest *ex parte* submission, February 25A, 2003. For example, Question Number Three in the survey consists of two statements followed by a question. The first sentence states, “[S]ome Cricket customers might decide that Cricket service does away with the need to have traditional wireline phone service in their home.” That statement is followed by the description of a concrete action, to wit, “[A]s a result, they terminate their wireline phone services from the local phone company.” The respondents then were asked, “Does this apply to you?” Asking respondents “Does this apply to you?” is the same as saying, for example, “Some people might work in an office. Does this **apply** to you?”

~~15i~~ In the *Second Louisiana 271 Order*, the Commission suggested that “a survey should include a question asking whether the respondent subscribes to wireline local exchange service or otherwise verify that the subscriber does not have wireline local exchange service.” *Second Louisiana 271 Order*, 13 FCC Rcd at 20629 ¶ 39

9, 140 customers upon which Mr. Teitzel's declaration relies), answered "yes" to Question 3, regarding whether she had terminated her traditional wireline telephone service as a result of her Cricket service, *and then also answered* "no" more than two months later when asked the concrete confirming question. "Do you have wireline local telephone service in your home?"

AT&T also questions the validity of the Cricket Survey on the basis that some respondents answered "yes" to both Question 2 (which asked whether they decided to use Cricket *instead of having traditional wireline phone service hooked up*) and Question 3 (which asked whether they had *terminated their traditional wireline phone services*). However, the fact that some respondents answered affirmatively to both Question 2 and Question 3 does not, by any stretch of the imagination, support the conclusion that these respondents have not substituted their Cricket PCS service for wireline service. Indeed, AT&T has it backwards: both questions asked respondents whether they are using Cricket's PCS service in lieu of subscribing to wireline service – one question asking if the Cricket service was purchased *instead of hooking up* new wireline service (Question 2) and the other asking if existing wireline service was *terminated* in favor of Cricket service (Question 3). The fact that a number of respondents answered "yes" to both questions indicates, at most, that they may not have made a clear distinction between or among different types of substitution. ^{16/} No commenter can make a credible argument that a

10/ In fact, the respondents relied upon by Qwest for the 18.5 percent substitution figure represent only a subset of actual wireless-for-wireline "replacement." The 18.5 percent consists only of customers who terminated existing wireline service and does not include customers who never obtain wireline service from the outset and rely exclusively on Cricket. Qwest also loses business to a competitor when a customer foregoes a second wireline because of Cricket, so it is entirely accurate to count that selection of wireless service in place of wireline service as an instance of substitution as well. See Exh. DLT-Track A/PI-NM-5 (New Mexico PRC - Corrected Direct Testimony of Keith Frederick) at 32-33 (text of Cricket Survey Questions 4 and 5). As the witness for the NMPRC Staff confirmed, replacement of wireline with PCS occurs in at least four scenarios: (1) when a customer chooses only Cricket from the outset without ever signing up for wireline service in the home (Cricket Survey Question 2); (2) when a customer terminates

Cricket billpayer who answers “yes” to Question 2 (regarding a decision to use Cricket in lieu of new wireline service), and “yes” to Question 3 (regarding a decision to terminate existing wireline service), and then answers “no” to the follow-up question, “Do you have wireline local telephone service in your home?” has not replaced Qwest wireline service with Cricket service in some fashion. ^{17/} These respondents have chosen Cricket’s PCS service over traditional wireline service, regardless of which type of substitution is taking place. See Exh. DLT-Track A/PI-NM-6 at 16 (New Mexico PRC – Redacted Rebuttal Testimony of Keith Frederick)

AT&T next suggests that Cricket service does not serve as an actual commercial alternative to Qwest wireline service because Cricket offers its service in only two New Mexico cities, Albuquerque and Santa Fe. AT&T Comments at 15. But a CLEC need not be competing across the BOC’s entire service territory in the state in order to qualify as a competing provider under Track A. The Commission has declared unequivocally that it “do[es] not read [Track A]

all existing wireline local telephone service in the home because of Cricket (Cricket Survey Question 3), (3) when a customer terminates a second or additional telephone line because of Cricket (Cricket Survey Question 4); and (4) when a customer foregoes adding a second or additional line because of Cricket (Cricket Survey Question 5). See Appendix to NMPRC Comments, Transcript of Proceedings, January 23, 2002, Day Two at 204-207.

^{17/} AT&T’s and WorldCom’s claim that the survey results were skewed because respondents may have been confused about the definition of “wireline,” AT&T Comments at 19 (citing the NMPRC Order ¶ 149) and WorldCom Comments at 6, also is unpersuasive. Rather, the survey made conservative assumptions - any respondent in the first pan of the survey who expressed confusion by asking for a definition of “wireline” was automatically coded as “don’t know,” and, accordingly, was excluded at the outset from the calculation that produced the 8,410 figure relied upon in Mr. Teitzel’s declaration (representing the most conservative number of Cricket customers who have substituted Cricket’s PCS service for Qwest’s wireline service). See Qwest IV, Att. 5, App. K, NM Vol. 1, Tab 1265 at 78-80 (Testimony of K. Frederick before NMPRC Hearing Examiner). Further, any respondent who expressed confusion about the term “wireline” in the second portion of the survey was provided a definition. See Exh. DLT-Track A/PI-NM-5 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick) at 11-12. Accordingly, every single one of the Cricket customers surveyed who was included in the 18.5 percent substitution figure (*i.e.*, those who answered “yes” to Question 3 and then later confirmed the absence of residential wireline telephone service) did so without equivocation.

to require *any* specified level of geographic penetration by a competing provider.” 18/

Moreover, Albuquerque and Santa Fe both lie entirely within Qwest’s local service area, Exh DLT-Track A/PI-NM-5 at 12 (New Mexico PRC – Corrected Direct Testimony of Keith Frederick), and are the two largest cities in New Mexico, together constituting nearly 38 percent of the state’s population 19/

AT&T also contends that Cricket’s PCS service “simply cannot be considered a legitimate alternative to Qwest wireline service” because it does not have exactly the same attributes as Qwest’s wireline service. AT&T Comments at 16. AT&T cites E-911 service, local number portability, the ability to connect multiple handsets to a single wireline, short-term contracts, and the ability to purchase DSL service as elements of competitive service that are absent from Cricket’s broadband PCS product. *See id.* at 16-18. But the Commission has previously concluded that a PCS provider can qualify as a “competing provider” under Track A precisely because PCS service and traditional wireline service are “functionally equivalent,” notwithstanding that there might be “certain technical and functional differences between PCS and wireline local exchange service.” *Second Louisiana* 27/ **Order**, 13 FCC Rcd 20621-22 ¶ 28. Additionally, the FCC previously has rejected AT&T’s argument and held that a service does not need to offer the same features, scope, technical configuration, or service characteristics in order

18/ *Michigan* 271 Order, 12 FCC Rcd 20584 ¶ 76 (emphasis in original). Specifically, the Commission has determined, based on the House Committee Report for Section 271, that a CLEC qualifies as a “competing provider” for Track A as long as it provides service “‘somewhere in the State’” – not necessarily throughout the state as a whole. *Id.* (emphasis in the original)

19/ As of April 2000, the total population of New Mexico was 1,819,046, while the populations of Bernalillo (in which Albuquerque is located) and Santa Fe counties were 556,678 and 129,292 respectively. U.S. Census Bureau, *State and County QuickFacts* at <http://quickfacts.census.gov> (last visited Feb. 12, 2003).

to qualify as a “competing provider.” ^{20/} Moreover, AT&T fails to acknowledge that Cricket’s PCS service has certain advantages over wireline service, such as mobility, which makes Cricket’s broadband PCS service an actual commercial alternative to Qwest’s wireline service

Finally, AT&T alleges that “the future of the Cricket wireless service is open to question” because Leap Wireless International, Inc., Cricket’s parent company, currently is experiencing financial difficulties and recently was de-listed from NASDAQ. *See* AT&T Comments at 15-16. But the fact is that Cricket currently is serving thousands of customers in New Mexico and, as the Commission made clear in the *Pennsylvania 271 Order*, the financial health and the competitive fortunes of a competitive provider are beyond the control of the local BOC. ^{21/} Indeed, the Commission does not even require a competitor to be marketing its services or accepting new customers in order to qualify as a competing provider for purposes of Track A. *See New Hampshire/Delaware 271 Order*, 17 FCC Rcd at 18673 ¶ 21; *Arkansas/Missouri 271 Order*, 16 FCC Rcd at 20778-79 ¶ 19.

^{20/} The FCC has acknowledged that the House of Representatives rejected a version of Track A that would have required the presence of a CLEC capable of offering “service that is comparable in price, *features, and scope*” to that offered by the BOC. *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77 n 170 (quoting H.R. Rep. No. 104-204, at 7 (1995) (emphasis added)) “[E]ven though there may not be complete identity in *technical configuration, service characteristics*, or charges for service between broadband PCS and traditional wireline service,” a PCS provider can still qualify as a “competing provider” under Track A because the two services are “functionally equivalent.” *Second Louisiana 271 Order*, 13 FCC Rcd at 20621-22 ¶ 29 (emphasis added).

^{21/} *See Pennsylvania 271 Order*, 16 FCC Rcd 17487 ¶ 126. Moreover, in the same press release in which Leap Wireless announced its de-listing from NASDAQ, Harvey P. White, Leap Wireless’ Chairman and CEO, reiterated that the de-listing “will not affect [Leap Wireless’] day-to-day operations and does not change [its] strategic focus.” Leap Wireless Press Release, December 11, 2002, “Leap Receives Decision From NASDAQ Listing Qualifications Panel To Delist Its Common Stock,” <http://www.leapwireless.com/press/content/2002/121102.html> (viewed February 19, 2003).

None of the commenters has raised any arguments to rebut the conclusion – based on Qwest's Commission-guided evidence regarding Cricket's PCS service in New Mexico – that a greater than *de minimis* number of customers in New Mexico have replaced their residential wireline service with Cricket's PCS service and that Cricket is an “actual commercial alternative” to Qwest in the residential New Mexico market

2. Qwest Faces Substantial Resale Residential Competition in New Mexico

Although AT&T contends that “resale lines cannot satisfy Track A,” AT&T Comments at 7-8, 11-13, the Commission has now twice stated expressly that the residential component of Track A may be satisfied through evidence of resale competition if there is facilities-based business competition. *Second Louisiana 271 Order*, 13 FCC Rcd 20635 ¶ 48; *Kansas Oklahoma 271 Order*, 16 FCC Rcd 6257-58 ¶ 43 n 101. In particular, in the *Second Louisiana 271 Order*, the Commission determined that Track A requires applicants to demonstrate merely that there is facilities-based competition in either the residential or business segments of the market – but not both. *Second Louisiana 271 Order*, 13 FCC Rcd 20633-35 ¶¶ 46-48. If CLECs are serving business customers over their own facilities, the Track A requirements are satisfied even if residential customers are being served entirely *via* resale

We note . . . that reading the statutory language to require that there must be facilities-based service to both classes of subscribers to meet Track A could produce anomalous results, and there appear to be overriding policy considerations that lead to a contrary construction of the statutory language. In particular, if all other requirements of section 271 have been satisfied, it *does not appear to be consistent with congressional intent to exclude a BOC from the in-region interLATA market solely because the competitors' service to residential customers is wholly through resale.*^{22/}

^{22/} *Id.* ¶ 48 (emphasis added). The Commission noted that “[t]he language of section 271(c)(1)(A) is ambiguous on its face,” since the requirement that there be both business and residential competition appears in a separate sentence from the requirement that CLECs be using

The Commission reaffirmed this conclusion in the Kansas/Oklahoma Section 271 case, in which there was serious dispute regarding whether certain evidence demonstrating the existence of facilities-based competition had properly been submitted to the record. *See Kansas/Oklahoma 271 Order*, 16 FCC Rcd 6257-58 ¶ 43 n.101. Although the Commission decided to consider the disputed evidence of facilities-based competition, it also explained that even if such evidence had been excluded, “[b]ased on the totality of circumstances . . . and based on our conclusions regarding checklist compliance, we likely would not have denied this application on ‘Track A’ grounds, and *would have relied on the existence of competitors’ service to residential customers through resale*” *Id* (emphasis added)

As demonstrated in Qwest’s application, as of October 31, 2002, numerous CLECs in New Mexico are serving 1,033 residential access lines *via* resale. *See* Teitzel Decl at 41, Exh DLT-Track A/PI-NM-1 at 4 (New Mexico Wholesale Volumes Data Report) Although no commenter has disputed the accuracy of these data, AT&T and WorldCom assert that resellers in New Mexico are not a “genuine commercial alternative to Qwest” because these resellers charge their customers premium rates and have “targeted . . . only the very small subset of customers who have been denied service by Qwest” ^{23/} WorldCom Comments at 3; AT&T

their own facilities” *Id* ¶ 46 As a result, “[i]t is not entirely clear whether the statutory language requires that the competitor or competitors offer predominantly facilities-based service to each category of subscribers — business and residential — independently or to the two classes taken together [T]he language of [section 271(c)(1)(A)] appears to stop short of mandating actual provisioning of competitive facilities-based telephone exchange services independently to both business and residential subscribers” *Id*

^{23/} AT&T also notes that the NMPRC found that the “majority of residential resale lines in New Mexico is served by a single carrier” *See* AT&T Comments at 14 (citing *NMPRC Final Order* ¶¶ 132,136) This observation is of no legal significance, however, because the Commission has repeatedly held that a BOC need only demonstrate that “one ‘competing provider’ constitutes ‘an actual commercial alternative’ to the BOC” *Qwest 271 Order* ¶ 20 (citing *Oklahoma 271 Order*, 12 FCC Rcd 8695 ¶14) (emphasis added), *see also New Jersey 271*

Comments at 14. However, the FCC has never required a service to be provided at the same price to be considered a “competitive alternative.”^{24/} Additionally, the Commission never has required a CLEC to target and serve the same type of customers the BOC is serving in order to be considered a competing provider, the commenters, moreover, fail to cite to any provision of the Act or any Commission order to support the proposition that CLEC customers who were disconnected by Qwest cannot be counted for purposes of Track A. In any case, the record in the New Mexico proceeding indicates that there is, in fact, “customer migration back and forth between Qwest and Comm South,” the predominant New Mexico reseller, *see* Appendix to NMPRC Comments, Transcript of Proceedings, January 23, 2002, Day Two at 141, and that Qwest has a continuing interest in serving the customers it may previously have disconnected for nonpayment. *Id.* at 139.

In the end, the assertion that resellers are targeting a small group of customers can be seen as nothing more than a rehash of the argument that the Track A “competing provider” requirement should include a market-share test. But this argument has repeatedly been rejected by the Commission. *See, e.g., Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77,

Order, 17 FCC Rcd 12283 ¶ 13 (concluding “MetTel *alone* serves a sufficient number of residential customers . . . and therefore, is an actual commercial alternative to Verizon in New Jersey”) (emphasis added); *Kansas/Oklahoma 271 Order*, 16 FCC Rcd 6258-59 ¶ 44 (determining “Cox’s customers *alone* satisfy Track A”) (emphasis added).

^{24/} As indicated above, the FCC has acknowledged that the House of Representatives rejected a version of Track A that would have required the presence of a CLEC capable of offering “service that is comparable in *price*, features, and scope” to that offered by the BOC. *Michigan 271 Order*, 12 FCC Rcd at 20585 ¶ 77 n. 170 (quoting H.R. Rep. No. 104-204, at 7 (1995)) (emphasis added).

Kansas Oklahoma 271 Order, 16 FCC Rcd at 6375-76 ¶ 268 The undisputed 1,033 resale residential lines in New Mexico are sufficient to satisfy the requirements of Track A. ^{25/}

C. The Justice Department Properly Recognizes That Section 271(c)(1) Cannot Be Read to Deny InterLATA Authority When a Local Market is Open

For the reasons discussed above, Qwest believes the record of residential competition in New Mexico fully satisfies Track A precedent That said, the record clearly indicates that the New Mexico residential market is open to competition, just as it is in Oregon and South Dakota, and as it is in the other nine Qwest states that the Commission already has approved for the provision of interLATA service. Qwest uses the same OSS systems. It adopts the same policies and procedures

The Commission has recognized that many competitors will chose to focus their resources on larger states over smaller, rural ones, and on the business market over the residential market. ^{26/} But as the Department of Justice notes in its Evaluation of this application, CLEC business decisions cannot serve as a veto of Section 271 authority for a BOC that has satisfied the competitive checklist and otherwise opened its markets:

The Commission appears to have recognized the difficult situation that would be presented if the requirements of the statute are otherwise met but a BOC that had opened its local market in a state were put into an indefinite limbo that only its competitors could relieve The Commission has been careful to avoid this “no-man’s land” in interpreting the interaction of the requirements of Track A and Track B. . . . The protections of Track B should not be read out of the statute but should

^{25/} In Vermont, the Commission held that no more than 345 residential lines provided by a CLEC constituted a greater than *de minimis* amount *Vermont 271 Order*, 17 FCC Rcd at 7630 ¶ 11

^{26/} See *id.* (recognizing evaluation of competition in Vermont requires comparison to “other largely rural slates”), *see also Kansas Oklahoma 271 Order*, 16 FCC Rcd at 6375-76 ¶ 268 (noting that CLEC entrance strategies beyond BOC control “might explain a low residential customer base”)

remain available to avoid conditioning a BOC's entry in a particular state solely on the actions of entrants who have demonstrated no interest in serving business and residential customers in a local market which has been proven open for both.

DOJ Evaluation at 10-11 n 42 (citations omitted)

The Department has it exactly right Qwest does not second-guess the business priorities of CLECs And, as discussed elsewhere, residential competition in New Mexico fully satisfies the requirements of Track A. But to the extent that AT&T and WorldCom have chosen to delay their entry into the residential market in New Mexico, it would violate both the statute and common sense for those decisions to serve as the basis for denying Section 271 authority to Qwest Indeed, the FCC has noted "Congress' desire to condition approval solely on whether the applicant has opened the door for local entry through full checklist compliance not on whether competing LECs actually take advantage of the opportunity to enter the market " *New York 271 Order*, 15 FCC Rcd at 4163 ¶ 427 Whether CLECs choose to enter a market – in particular, the FCC has noted, the *residential* segment of a market – will largely turn on "[f]actors beyond a BOC's control, such as individual CLEC entry strategies."^{27/} Indeed, it is the approach of interLATA competition from Qwest that appears finally to have prompted WorldCom's "plan" to enter the New Mexico residential market in March. *See WorldCom Comments* at 6. To state the obvious, it would be an absurd result if Qwest's interLATA authority were delayed now, reducing WorldCom's incentives to follow through on its entry

^{27/} *Kansas/Oklahoma 271 Order*, 16 FCC Rcd at 6375-76 ¶ 268, *see also Vermont 271 Order*, 17 FCC Rcd at 7660 ¶ 63; *Rhode Island 271 Order*, 17 FCC Rcd at 3352 ¶ 104; and *Massachusetts 271 Order*, 16 FCC Rcd at 9118-19 ¶ 235.